Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER 1993 TERM

COLORADO DEPARTMENT OF HEALTH AND
MILDRED SIMMONS,

Petitioners,

v.

BERNADETTE BAUMAN, MARION SMITH, AND
ANTOINETTE J. STAJDUHAR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

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QUESTION PRESENTED

1. Whether the Colorado Court of Appeals violated the Supremacy Clause and essential principles of federalism in holding that the Colorado Governmental Immunity Act's jurisdictional limitation on Colorado state courts cannot bar suits in Colorado state courts under federal law?

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OPINION BELOW

The decision of the Colorado Court of Appeals has been published at 857 P.2d 499 (Colo. App. 1993).

JURISDICTION

The Colorado Court of Appeals entered judgment on January 28, 1993. The Court denied petitioner's petition for rehearing on March 11, 1993.

The Colorado Supreme Court granted petitioner an extension of time to file a petition for certiorari to and including April 19, 1993. Petitioner filed its petition for certiorari with the Colorado Supreme Court on April 16, 1993. The Colorado Supreme Court denied petitioner's petition for certiorari on September 7, 1993. The order denying certiorari stated that Justice Kirshbaum would have granted certiorari with respect to the issue presented by petitioner to this Court.

This Court granted petitioner an extension of time within which to file its petition for certiorari to and including January 5, 1994.

This Court has jurisdiction to entertain this petition for certiorari pursuant to the provisions of 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., art. VI, cl. 2:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

42 U.S.C. § 1983:

> **Civil Action for Deprivation of Rights**
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Section 24-10-109, C.R.S. (1988 Repl. Vol. 10B):

> (1) Any person claiming to have suffered an injury by a public entity or by an employee thereof while in the course of such employment shall file a written notice as provided in this section within one hundred eighty days after the date of discovery of the injury, regardless of whether the person then knew all of the elements of a claim or of a cause of action for such injury. Compliance with the provisions of this section shall be a jurisdictional prerequisite to any action brought under the provisions of this article, and failure of compliance shall forever bar any such action.

Section 24-10-119, C.R.S. (1988 Repl. Vol. 10B):

> The provisions of this article shall apply to any action against a public entity or a public employee in any court of this state having jurisdiction over any claim brought pursuant to any federal law, if such action lies in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant.

STATEMENT OF THE CASE

On September 28, 1989, plaintiffs brought an action arising out of their former employment with the Colorado Department of Health ("DOH"). (Vol. I, pp.1-3) Plaintiffs alleged that DOH is an agency of the State of Colorado. (Vol. I, p.1) In fact, DOH is a department of the State of Colorado. Sections 24-1-110(1)(i) and 24-10-119, C.R.S. Defendant Mildred Simmons ("Simmons") was, at all times relevant to plaintiffs' allegations, the Director of the Division of Health Facilities at DOH. (Vol. I, p.1) Plaintiffs brought their claims under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-623, the Fair Labor Standards Act, 29 U.S.C. §§ 216(b)-217 and §§ 24-34-301 to 306, C.R.S. (1988).

On February 14, 1990, defendants filed their motion to dismiss and attached thereto the affidavit of Micki V. Perez, a records custodian with the Office of the Attorney General of the State of Colorado for notices of claim under the Colorado Governmental Immunity Act. This affidavit recited that she had examined the files of the Attorney General and found no notice of claim received from any of the plaintiffs. (Vol. I, p.20)

On July 31, 1991, the district court entered its order finding that plaintiffs had not complied with the provisions of § 24-10-109, C.R.S., applicable through operation of § 24-10-119, C.R.S., and also finding that plaintiffs' filing of the charges of discrimination did not constitute a notice of claim as contemplated by § 24-10-109, C.R.S. (1988). (Vol. I, pp.45-46) Upon a further finding that plaintiffs had failed to provide a notice of claim as required by § 24-10-109, C.R.S., and that their claims were thus jurisdictionally barred, the trial court dismissed plaintiffs' cause of action. (Vol. I, p.46)

The Colorado Court of Appeals affirmed in part and reversed in part. The Court held that, since plaintiffs had not complied with the jurisdictional requirements of § 24-10-109, C.R.S., their state claims for relief were barred. However, the

Court held that plaintiffs' failure to comply with § 24-10-109, C.R.S. did not bar their federal claims.

Petitioner filed a petition for certiorari with the Colorado Supreme Court, contending that the Court of Appeals interpreted *dicta* in this Court's decision of *Howlett v. Rose,* 496 U.S. 356, 110 S. Ct. 2430, 110 L.Ed.2d 332 (1990), in such a manner as to violate principles of federalism by precluding the Colorado General Assembly from establishing the jurisdiction of its state courts.

Respondents filed a cross-petition for certiorari, contending that the Court of Appeals erred in concluding that the notice provided in the age discrimination charges did not substantially comply with the notice provisions of the Colorado Governmental Immunity Act.

The Colorado Supreme Court denied certiorari with respect to both petitioner's petition for certiorari and respondents' cross-petition for certiorari. The order denying certiorari indicated that Justice Kirshbaum would have granted certiorari with respect to both issues.

This petition for certiorari follows.

STATEMENT OF RELATED CASES

There are no related cases.

REASONS FOR GRANTING THE WRIT

A. The Colorado Court of Appeals Interpreted *Dicta* in This Court's Decision of *Howlett v. Rose,* 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990), in Such a Manner as to Violate Principles of Federalism by Precluding the Colorado General Assembly From Establishing the Jurisdiction of the Colorado State Courts

The present language of § 24-10-109, C.R.S., as passed by the Colorado General Assembly in 1986, provides the following regarding filing of a notice of claim:

> (1) Any person claiming to have suffered an injury by a public entity or by an employee thereof while in the course of such employment shall file a written notice as provided in this section within one hundred eighty days after the date of discovery of the injury, regardless of whether the person then knew all of the elements of a claim or of a cause of action for such injury. *Compliance with the provisions of this section shall be a jurisdictional prerequisite to any action brought under the provisions of this article,* and failure of compliance shall forever bar any such action. (Emphasis added)
>
> (2) The notice shall contain the following:
>
> (a) The name and address of the claimant and the name and address of his attorney, if any;
>
> (b) A concise statement of the factual basis of the claim, including the date, time, place, and circumstances of the act, omission, or event complained of;
>
> (c) The name and address of any public employee involved, if known;
>
> (d) A concise statement of the nature and the extent of the injury claimed to have been suffered;
>
> (e) A statement of the amount of monetary damages that is being requested.

> (3) If the claim is against the state or an employee thereof, the notice shall be filed with the attorney general. If the claim is against any other public entity or an employee thereof, the notice shall be filed with the governing body of the public entity or the attorney representing the public entity. Such notice shall be effective upon the mailing by registered mail or upon personal service.

Section 24-10-119, C.R.S. provides:

> The provisions of this article shall apply to any action against a public entity or a public employee in any court of this state having jurisdiction over any claim brought pursuant to any federal law, if such action lies in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant.

In 1986, compliance with § 24-10-109, C.R.S. was made a *jurisdictional* prerequisite to any action brought under the Colorado Governmental Immunity Act ("Act"). *See Aetna Cas. & Surety Co. v. Denver School Dist. No. 1,* 787 P.2d 206 (Colo. App. 1989). Failure to strictly comply with the 180-day notice provision operates as a jurisdictional bar to any claim arising under the Act. *East Lakewood Sanitation District v. District Court,* 842 P.2d 233 (Colo. 1992). Before the 1986 changes to § 24-10-109, C.R.S., and the enactment of § 24-10-119, C.R.S., the Colorado Court of Appeals held that the notice of claim requirement did not apply to federal claims under 42 U.S.C. § 1983. *Mucci v. Falcon School Dist. No. 49,* 655 P.2d 422 (Colo. App. 1982); *also see Chacon v. Zahorka,* 663 F. Supp. 90 (D. Colo. 1987).

The issue presented in this case is whether the 1986 changes to the Act, making compliance with § 24-10-109 jurisdictional as to both state and federal claims, were improperly invalidated by the Colorado Court of Appeals. More specifically, the question presented in this case is whether the Court of Appeals' erred in its implicit determination that § 24-10-119 is unconstitutional in

violation of the Supremacy Clause of the United States Constitution. DOH submits that no United States Supreme Court decision limits the ability of the states to restrict state court jurisdiction under Supremacy Clause rubric, yet that is the necessary implication of the Court of Appeals interpretation of *Felder v. Casey,* 487 U.S. 131, 108 S.Ct. 2303, 101 L.Ed.2d 123 (1988) and *Howlett v. Rose,* 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990).

In *Felder v. Casey, supra,* this Court held that a Wisconsin notice of claim statute, which was *not* a restraint on the jurisdictional authority of Wisconsin's state courts, did not apply to a 42 U.S.C. § 1983 claim brought in state court. In reversing the Wisconsin Supreme Court's decision, this Court held that, although states may establish rules of procedure governing litigation in their own courts, when state courts entertain a federally created cause of action, the federal claim cannot be defeated by forms of local practice.

Felder v. Casey is consistent with the Colorado Court of Appeals' decision in *Mucci v. Falcon School Dist. No. 49, supra.* However, neither *Felder v. Casey* nor *Mucci* addressed a situation in which, by statute, the failure of a claimant to comply with a notice of claim statute divests state district courts of subject matter jurisdiction over *all* tort claims, both state and federal, against governmental entities, and does so in a purely neutral manner. That issue is presented here and the issue was incorrectly decided by the Colorado Court of Appeals. The flaw in the Court of Appeals' reasoning results from its interpretation of what petitioner perceives as *dicta* in this Court's decision in *Howlett v. Rose, supra.*

In *Howlett v. Rose, supra,* this Court held that a state law sovereign immunity defense is not available in a § 1983 action brought in a state court that otherwise has jurisdiction when that defense would not be available if the action were brought in a federal forum. The Court premised its holding on the fact that the state law sovereign immunity defense did not operate in a neutral manner and discriminated against the § 1983 federal

cause of action. 110 S.Ct. at 2440. *See FERC v. Mississippi,* 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982).

However, this Court in *Howlett* also emphasized certain principles of federalism which, DOH contends, are nullified by the Colorado Court of Appeals decision in this case. This Court in *Howlett* noted that when a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, the Supreme Court "must act with utmost caution before deciding that it is obligated to entertain the claim." 110 S.Ct. at 2440. Further, the Supreme Court articulated that:

> The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented. The general rule 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.' [Cites] The States thus have great latitude to establish the structure and jurisdiction of their own courts. [Cite] In addition, States may apply their own neutral procedural rules to federal claims, unless those rules are preempted by federal law.

110 S.Ct. at 2441. *Also see Martinez v. California,* 444 U.S. 277, 283, n.7, 100 S.Ct. 553, 558, n.7, 62 L.Ed.2d 481 (1980) (the states need not establish courts competent to entertain § 1983 claims).

In *Howlett,* this Court never confronted the issue presented in this case: whether a Governmental Immunity Act notice requirement which is jurisdictional and *neutral* is invalid with respect to any federal claim. Stated another way, is a state court of general jurisdiction compelled to entertain a federal claim when state claims arising out of the same incident are jurisdictionally barred by the application of a neutral state law? The notice requirement of § 24-10-109, C.R.S. (1988 Repl. Vol. 10A) was made jurisdictional in 1986 and applies in the same manner

to both state and federal causes of action. *See* § 24-10-119, C.R.S. Thus, the consequences of the Court of Appeals' decision here is to violate the principle of federalism prohibiting federal law from requiring the state to create a court competent to hear a case in which the federal claim is presented. *See Martinez v. California, supra; also see Herb v. Pitcairn,* 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed.2d 789 (1945). In effect, the decision of the Colorado Court of Appeals dictates that federal claimants need not "take the state courts as [he] finds them," *Howlett,* 110 S.Ct. at 2441, although all other claimants must.

The Court of Appeals' holding is premised upon the following *dicta* contained in *Howlett*:

> The force of the Supremacy Clause is not so weak that it can be evaded by mere mention of the word 'jurisdiction.' Indeed, if this argument had merit, the State of Wisconsin could overrule our decision in *Felder v. Casey,* 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988), by simply amending its notice of claim statute to provide that no state court would have jurisdiction of an action in which the plaintiff failed to give the required notice.

110 S.Ct. at 2446. This language cannot be read to mean that a notice of claim statute which is jurisdictional and neutral on its face can *never* bar a federal claim. If this were so, the principles of federalism articulated in *Howlett* previous to this language would be rendered meaningless. Some state procedural requirements are jurisdictional in nature. For example, the failure to *timely* file a notice of appeal pursuant to C.A.R. 4 deprives the Colorado appellate courts of jurisdiction and requires dismissal of the appeal. *Federal Lumber Co. v. Hanley,* 33 Colo. App. 18, 515 P.2d 480 (1973). By the only logical extension of the Court of Appeals' reasoning in this case, failure to timely file a notice of appeal under C.A.R. 4 cannot impede a federal claim. Otherwise the proscription in *Howlett* against state restrictions dressed in the language of jurisdictional limitations would be contravened.

However, this cannot have been the intent of this Court in *Howlett.*

The notice requirement of § 24-10-109 was not an attempt to evade the Supremacy Clause "by mere mention of the word jurisdiction." The Colorado General Assembly did not attempt to overrule *Felder v. Casey* by amending its notice of claim statute to make it jurisdictional; *Felder v. Casey* was decided in 1988, but the Colorado Governmental Immunity Act was amended in 1986. The decision to make § 24-10-109 jurisdictional was the result of a deliberative legislative process based upon important public policy considerations, not a reactive evasion of this Court's holding in *Felder v. Casey.* Where a state statute which is jurisdictional applies neutrally to both state and federal claims, the state court lacks jurisdiction over the claim and federalism precludes federal law from compelling the state court to exercise jurisdiction. *See Reiff v. Avon School Dist. No. 4-1,* 458 N.W.2d 358 (S.D. 1990); *also see Howlett, supra.*

The effect of the Court of Appeals' decision in this case is to nullify § 24-10-119, C.R.S., as well as C.A.R. 4 and all other existing procedural restraints in Colorado law, with respect to the pursuit of federal claims in Colorado's state courts, and to impose jurisdiction on state courts over federal claims arising from the same operative facts as state claims which are jurisdictionally barred. *See Aetna Cas. & Surety Co. v. Denver School Dist. No. 1, supra.* Since this holding violates the principles of federalism articulated in *Howlett,* DOH submits this decision must be reversed.

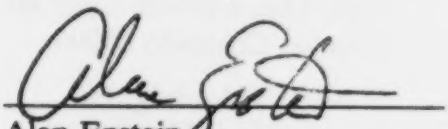
CONCLUSION

This case presents an issue of first impression, one unanswered by this Court in *Howlett,* i.e., whether a neutral statutory scheme depriving state courts of jurisdiction over both state and federal claims where the claimant did not comply with notice of claim requirements violates the Supremacy Clause of the United States Constitution. As previously discussed, the effect of the

Court of Appeals' decision is also to invalidate § 24-10-119, C.R.S. Because of the impact of the Court of Appeals decision on the exercise by states of sovereignty over their courts, it presents exactly that type of issue for which the certiorari process exists. *See* Supreme Court Rule 10.1(c).

Dated this 3rd day of January, 1994.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that on this 3rd day of January, 1994 a true and correct copy of the foregoing **PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT** was mailed by placing the same in the United States Mail, postage prepaid, addressed as follows:

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